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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1120

FRANCES METZGER WIRTH STEPHAN, Guardian of the Estate of CHARLES WIRTH, *Petitioner,*

v.

THE MARLIN FIREARMS CO., INC., GERHARD HOHN, Administrator of the Estate of F. A. LANDERS, JOHN MISCIUCH and CARL PAVLICK, *Respondents.*

PETITIONER'S REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

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The petition for *certiorari* rests basically upon three contentions: first, that petitioner's right of peremptory challenge was improperly curtailed by the trial judge's refusal to inquire on *voir dire* about the prospective jurors' experience with firearms; second, that the Court of Appeals erred in holding that petitioner could not complain unless she affirmatively showed that she had been prejudiced; and, third, that the trial court erred in refusing to inquire whether any prospective juror had a financial interest in gun manufacturing companies other than respondent Marlin. Petitioner asserts that each of these questions is important and that there is a conflict of decision as to each of them.

The brief in opposition makes no reference whatever to the Court of Appeals' determination with respect to the necessity of showing prejudice. Evidently respondents

found no basis upon which to challenge petitioner's contention that this ruling rested upon a misreading of *Northern Pacific R.R. Co.* v. *Herbert*, 116 U.S. 642, and that the ruling is, moreover, in conflict with the decisions of this Court and of at least four other circuits.

Moreover, respondents make only passing reference to the issue respecting the jurors' financial interest in gun manufacturing companies. Basically, respondents' position is that such an interest would be "hardly relevant" (Br. Opp. p. 12). But this contention simply underscores the conflict between the decisions below and the rule applied in two other circuits, where the courts, as we have shown (Pet. pp. 21-22), take quite a different view of relevancy.[1]

In dealing with the contention that the trial judge erred in refusing to ask the jurors about their experience with guns, respondents make several alternative contentions. First, respondents attempt to evade the issue by asserting, quite incorrectly, that petitioners' counsel were concerned only with excluding any "gun experts" from the jury. From that faulty premise, respondents conclude that petitioner can have no complaint, because the judge was willing to ask whether anyone was an expert. (See Br. Opp., pp. 5, 7.)

But the question petitioner presents rests, not upon the court's failure to ask whether any prospective juror was a gun expert, but upon the court's refusal to make a much different inquiry designed to disclose broadly what the prospective jurors knew about, and how they felt about, guns.

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[1] Respondents' reliance on *Dennis* v. *United States*, 339 U.S. 162, and *Frazier* v. *United States*, 335 U.S. 497, is misplaced. Not only did those cases involve only challenges for cause, but also the Court indicated that the parties were entitled to explore thoroughly the matter of government employment as it might influence a particular prospective juror. See, *e.g.*, *Dennis*, *supra*, at 168.

As the transcript—which is quoted in detail in the petition (pp. 8-10)—clearly discloses, three distinct lines of interrogation were discussed. The opening, and primary, request of petitioner's counsel was that they would "like to know whether any members of the panel own any guns or have any familiarity with firearms or anybody in their family, or whether they do any hunting; that kind of thing," because counsel believed they were "entitled to know whether they've had experience with guns and take our choice" (Pet. p. 9). The judge rejected this request, because "this question about are there anybody familiar with the use of firearms is going to lead nowhere. It certainly isn't going to produce challenges for cause as far as I'm concerned" (Pet. p. 10).

The judge then volunteered to ask the much more restricted, and quite discrete, question "whether anyone has been in the business of repairing firearms or expert of any sort," and agreed to the suggestion of petitioner's co-counsel that the jurors be asked whether any of them belonged to a gun club (Pet. p. 10).

In short, the court was unwilling to probe into the jurors' experience and familiarity with firearms except to the extent that they might be experts, for he believed that only professional expertise might be a ground for challenge for cause. But petitioner's counsel asserted their right to a broader inquiry, and that assertion, we submit, was firmly based upon petitioner's right to peremptory challenge. Counsels' interest in learning whether a prospective juror "owned any guns," or "had any familiarity with firearms," or "did any hunting," or whether "anybody in [his] family" was familiar with guns, reflected a concern quite different from whether a juror was a firearms expert. For example, petitioner's counsel might reasonably have be-

lieved that a gun expert would regard a rifle with an outmoded safety mechanism as a dangerous instrumentality, but that this might not be true of an inexperienced but enthusiastic hunter; and counsel would have been particularly concerned about a person who had used a rifle for years without accident if that rifle had a safety mechanism like the Marlin's. As counsel said, "I think we're entitled to know whether they've had experience with guns and take our choice."

The court, however, eliminated that choice, and our claim is that this limitation on *voir dire* represented an illegitimate encroachment upon petitioner's right of peremptory challenge. This issue is substantial, and the lower courts' disposition of that issue is in conflict with the decisions of other courts. The question as respondents would have it (pp. 1-2)—"Where the trial court was induced to ask a much narrower question on the Voir Dire than had been previously requested by Petitioner's counsel, can Petitioner now claim an abuse of discretion by the trial court in its conduct of the Voir Dire?"—is not relevant to this case. We add that, if that question were relevant, respondents cause would hardly be advanced. If a trial judge deprives a party of a substantial right by refusing to ask a broad question, the party's counsel does not waive the error by "inducing" the court to ask narrower questions.

Respondents make three additional arguments. First, they seem to contend that, assuming petitioner's interest went beyond the uncovering of "gun experts," the fact is that "at the very outset of the Voir Dire the entire panel was alerted to the fact that any experience relating to firearms should be disclosed" (Br. Opp. p. 5). Evidently this assertion rests upon a mistaken notion that the prospective juror who was a firearms inspector was excused

as soon as he revealed his profession. But whatever the basis for the contention, the fact is that it is wholly unsupported by the record. The salient facts, which are summarized in more detail in the margin, are that the expert was *not* excused when he disclosed his occupation; that the judge thereafter explicitly assured the jury that they need *not* be concerned about having had experience with firearms; and that the expert was excused only at the end of the *voir dire,* after he had stated that he knew personally the expert witness for the plaintiff and that he had one of his writings.[2] The suggestion that in these circumstances the refusal of the trial judge to pursue the line of inquiry requested by petitioner's counsel was somehow rectified because the jury knew it should disclose the desired information is, we submit, genuinely frivolous.

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[2] When the prospective juror volunteered that he was a gun inspector, the judge, as we indicated in the petition (pp. 8, 11), did not excuse him. He simply asked him whether he could try the case fairly, the juror responded that he could, and the judge said "Thank you" (R. pp. 12-14). Later, as we also pointed out in our petition (pp. 10-11), the judge told the jury, "I'm not going to ask whether any of you have had experience in the use of firearms. I would assume all have had in some capacity or another all being citizens of the United States who have a right under the Constitution to bear arms, and some others who have had a duty to do so" (A. 9). Then, practically at the conclusion of the *voir dire* when the judge asked the panel whether they knew any of the prospective witnesses who had been named, the gun expert said that he knew petitioner's expert witness and that he had one of his books on firearms (R. 38); but even then the judge said nothing and did not excuse him. Respondents' counsel shortly thereafter, at a bench conference, challenged the gun expert; but it was not until all of the questioning on *voir dire* had ended that the prospective jurors knew that the gun expert, as well as some others, were not to be on the panel; and then only because their names were not included on the list of 27 names constituting the basic list from which 12 were to be chosen (R. pp. 46-47).

All that could possibly be inferred from this sequence of events is that the prospective jurors, at the *end* of the *voir dire,* might have thought a juror who was a gun expert and who also knew one of the expert witnesses to be called and was familiar with his writings should not serve.

Respondents' next argument is equally insubstantial. They maintain that the restriction on *voir dire* was not prejudicial because, in the interval between selection of the jury and the trial, "ample time was available to conduct [an] investigation" of the jurors. But neither the decisions below nor any other decisions of which we are aware—and respondents cite none—support the surprising notion that an improper limitation on *voir dire* should be ignored because the petitioner might have been able to secure the desired information by hiring detectives to investigate each of the jurors. Indeed, such an investigation after a jury is selected would probably violate the Canons of Professional Ethics and might also constitute criminal contempt of court.[3]

Finally, respondents devote considerable attention to decisions standing for the general proposition that the trial judge has a large measure of discretion in conducting the *voir dire,* a principle also adverted to by the Court of Appeals in this case. Of course he does—in cutting off unduly prolonged interrogations,[4] in preventing abuse of jurors or improper efforts to influence the panel on the merits, and doubtless also in deciding many types of challenge for cause. See Pet. pp. 15-16. But, as other federal courts have recognized, the trial judge has no discretion to foreclose a line of inquiry that is material to the intelligent exercise of peremptory challenges, for otherwise the right of peremptory challenge would be undercut by the discretionary power of the court.

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[3] Canon 23 provides, *inter alia,* that "both before and during the trial [a lawyer] should avoid communicating with [jurors,] even as to matters foreign to the cause." And in *Sinclair* v. *United States,* 279 U.S. 749, this Court affirmed a contempt conviction based in large part upon the fact that the defendant had had the jurors placed under surveillance.

[4] As the complete transcript of the *voir dire* demonstrates, the proceeding was not at all lengthy in this case.

Conclusion

For the reasons set forth above, we submit that the arguments set forth in the petition for certiorari have not been undermined by the brief in opposition, and that *certiorari* should be granted.

Respectfully submitted,

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